IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 278 of 2003
WITH
CRIMINAL APPEAL No. 284 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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ROHITBHAI KESHUBHAI SOLANKI - Appellants
Versus
STATE OF GUJARAT - Opponent

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Appearance :

1. Criminal Appeal No. 278 of 2003.
MR RAJESH M AGRAWAL for Appellant.
MR KP RAVAL, APP for Opponent.

2. Criminal Appeal No. 284 of 2003.
MR B M MANGUKIYA for Appellant.
MR KP RAVAL, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 10/10/2006

COMMON ORAL JUDGMENT

(**Per : HONOURABLE MR.JUSTICE K.A.PUJ**)

1. These two appeals are filed by the appellants, namely, Rohitbhai Keshubhai Solanki and Babankhan @ Lala Gufrankhan Pathan – original accused Nos. 3 & 4 respectively against the same judgment and order dated 20.01.2003 passed in N.D.P.S. Case No. 03 of 2002 by the learned Joint

District Judge and Additional Sessions Judge, Ahmedabad (Rural), Ahmedabad and since both the appeals are heard together, the same are being disposed of by this common judgment.

2. Criminal Appeal No. 278 of 2003 is filed by the appellant – original accused No. 3 challenging the correctness, legality, validity or propriety of his conviction under Section 8 (c) read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as “the Act”) and sentence of 10 years R.I. And to pay a fine of Rs. 1 Lac and in default thereof, further to undergo S.I. for one year.

3. Similarly, Criminal Appeal No. 284 of 2003 is filed by the appellant – original accused No. 4 i.e. Babankhan @ Lala Gufrankhan Pathan against the very judgment dated 20.01.2003 passed in N.D.P.S. Case No. 03 of 2002 by the

learned Joint District Judge and Additional Sessions Judge, Ahmedabad (Rural), Ahmedabad convicting him under Section 8 read with Section 29 of the Act and sentencing him to undergo R.I. for 10 years and fine of Rs. 1 Lac and in default thereof, further to undergo S.I. for one year.

4. The brief facts giving rise to the present two appeals are as under :-

5. On 18.12.2001, the complainant Mr. J.J. Mewada, Superintendent, Prohibition & Excise Department, State Striking Force No. I, Gujarat State, Ahmedabad was present in his office. At that time at 11.30 hours, he received secret information through informant that three persons, namely, (1) Govindsinh Naksinh Chauhan – co-accused No. 1 (2) Omkarsinh Pursinh Parmar – co-accused No. 2 both native of M.P. & (3) Rohitbhai Keshubhai

Solanki resident of village Mithapur, Tal. Bavla, Dist. Ahmedabad, accused No. 3 in aid and abetment of one another were to pass with brown sugar on foot during 15.00 to 16.00 p.m. hours from Sarkhej Highway, Sanand Chokdi, Gandhinagar road. After completing the necessary formalities, raiding party was organized and the watch was kept and at about 18.15 hours, said three persons were seen coming. The co-accused No. 1 and co-accused No. 2 were seen coming with a plastic bag in their hands and the present appellant – original accused No. 3 was with the said accused Nos. 1 & 2. They were stopped. The co-accused No. 1 was searched first. Before search was started of the accused No. 1, he informed that he could get himself searched in the presence of Executive Magistrate or any other Gazetted Officer except police and ultimately he was searched and from the plastic bag which was in his hand, brown sugar weighing 368 Grams was found.

Thereafter, co-accused No. 2 was searched and he was also informed in the same manner. Ultimately he was searched and from the plastic bag which was in his hand, brown sugar weighing 308 Gram was found. The appellant – original accused No. 3 was also searched and no contraband brown sugar nor any incriminating material was found from his possession. The samples were taken and the appellant – original accused No. 3 and co-accused Nos. 1 & 2 form whose possession the contraband brown sugar was found were arrested after preparing the panchnama of the seizure of contraband brown sugar found from the accused Nos. 1 & 2.

6. Mr. J.J. Mewada, Superintendent gave complaint before himself and vide C.R. No. Prohibition 2469 of 2001, the offences under Sections 9, 22, 23 & 29 of the Act were registered with Prohibition Station (West),

Ahmedabad City on 18.12.2001 at 19.15 hours and the investigation was started and after completion of the investigation, Mr. R.S. Sindhi, Prohibition Inspector, Prohibition & Excise Department, State Striking Force No. I, Gujarat State, Ahmedabad filed the charge-sheet under Sections 9, 22, 23 & 29 of the Act against the accused Nos. 1 & 2 and the present appellant – accused No. 3 and against one Babankhan @ Lala Gufrankhan Pathan, resident of village Dudhalia, Tal. Gandhar, Dist. Jalawar, Rajasthan who was arrested on 23.12.2001 at 20.30 hours during the course of investigation, in the Court of Sessions Judge, Ahmedabad (Rural), Ahmedabad which was registered as NDPS Case No. 3 of 2002.

7. The charge was read over and explained to the accused. As the accused have not pleaded guilty to the said charge, they were put to trial and tried by the learned Joint District

Judge & Additional Sessions Judge, Ahmedabad (Rural), Ahmedabad in NDPS Case No. 03 of 2002.

8. To prove the culpability of the accused, prosecution has in all examined as many as 8 witnesses. Prosecution has also produced several documents and relied upon the contents of the same. After recording of the evidence of the prosecution witnesses was over, the learned Joint District Judge and Additional Sessions Judge, Ahmedabad (Rural) explained the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement, as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by reiterating that they have been falsely implicated.

9. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Joint District Judge & Additional Sessions Judge, Ahmedabad (Rural) has held that the prosecution has established beyond reasonable doubt that the charge levelled against the accused were proved and, therefore, the accused Nos. 1 & 2 were found guilty of the offence punishable under Section 8 (c) read with Section 22 (c) & 29 of the Act and the appellants – original accused Nos. 3 & 4 were found guilty for the offence punishable under Section 8 (c) read with Section 29 of the Act and were sentenced to suffer R.I. for 10 years and to pay fine of Rs. 1 Lac each and in default of payment of fine, further to suffer S.I. for one year each.

10. Being aggrieved and dissatisfied with the said judgment and order dated 20.01.2003

passed by the learned Joint District Judge & Additional Sessions Judge, Ahmedabad (Rural), Ahmedabad in NDPS Case No. 03 of 2002, the appellants – original accused Nos. 3 & 4 have preferred these two appeals separately before this Court under Section 374 of the Code of Criminal Procedure.

11. Mr. R.M. Agrawal, learned advocate appearing for the appellant – accused No. 3 in Criminal Appeal No. 278 of 2003 has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Joint District Judge & Additional Sessions Judge, Ahmedabad(Rural), Ahmedabad dated 20.01.2003. He has submitted that the learned Additional Sessions Judge has erred in convicting the appellant – accused No. 3 though there was no cogent or adequate evidence showing his guilt in the matter. He has further submitted that

the learned Additional Sessions Judge, Ahmedabad (Rural) has failed to appreciate that the appellant is innocent and has not committed the alleged offence. Even as per the case of the prosecution, the appellant – original accused No. 3 was found only in the company of the co-accused Nos. 1 & 2 from whose possession, the alleged brown sugar was found and when the search of the present appellant – accused No. 3 was made, nothing incriminating was found from his possession. He has further submitted that no statement of any of the co-accused under section 67 or 53-A is recorded by the Police or the concerned Officer. From the evidence, it is crystal clear that the secret information is concocted one and when the secret information was alleged to be received by the complainant, Mr. J.J. Mewada, he has not reduced the same in writing and the copy thereof was not sent to the immediate official superior. Merely because the

appellant – original accused No. 3 was found in the so-called company of the co-accused Nos. 1 & 2 and admittedly no contraband article was found from the possession of the appellant – accused No. 3, nor any incriminating material was also found from his possession connecting him with the alleged commission of offence by the other co-accused, the appellant – original accused No. 3 could not have been implicated or convicted for the alleged offence. If the deposition of all the prosecution witnesses are taken into consideration, it is crystal clear that there is nothing against the appellant – original accused No. 3 connecting him with the alleged commission of offence and even then the learned Trial Judge in flagrant violation of the principles of evaluation and appreciation of prosecution evidence in criminal trial and in flagrant violation of the decision of the Hon'ble Supreme Court arbitrarily, capriciously,

illegally and by assigning no convincing reason has convicted and sentenced the appellant – original accused No. 3.

12. Mr. Agrawal has further submitted that the conviction of the appellant – accused No. 3 cannot be sustained in view of the decision of the Hon'ble Supreme Court in the case of **Abdul Rashid V/s. State of Bihar, AIR 2001 S.C. 2422** wherein while referring to the judgment in the case of Raja Ram Jaiswal V/s. State of Bihar, AIR 1964 S.C. 828, the Hon'ble Supreme Court has held that the statement of the appellant made before the Superintendent of Excise would not be admissible in view of this judgment and further held that if that statement is taken out from the purview of consideration then on the residue of material, namely, that the appellant was found coming together with the co-accused and on the statement of the co-

accused, a conviction under the provisions of Narcotics Drugs and Psychotropic Substances Act, 1985 cannot be sustained. The Court, therefore, set aside the conviction and sentence passed against the appellant and he was acquitted of the charge levelled against him. Relying upon this judgment, Mr. Agrawal has submitted that since nothing incriminating was found from accused No. 3 and his statement made before the Officer could not be considered as evidence and the evidence of co-accused is also not an admissible evidence, in this view of the matter, the appellant – accused No. 3 also deserves to be acquitted.

13. Mr. Agrawal has further submitted that not a single ingredient under Section 29 of the Act is satisfied by the prosecution i.e. to say not a single ingredient of abetment or criminal conspiracy is satisfied by the

prosecution as required under Section 107 & 120 A of IPC. No confessional statement under Section 67 or 53-A of the Act was recorded. Mr. J.J. Mewada, the complainant and Superintendent of Prohibition and Excise Department has no authority of search, seizure and arrest for the offence under the Act. He has not been invested with any power for the investigation of the offences falling under NDPS Act and his action is without power and jurisdiction.

14. Mr. Agrawal has further submitted that from the designation, it appears that Mr. Mewada is not a Police Officer and when he is not a Police Officer, then there is no question of registering the FIR in Prohibition station and Mr. Sindhi who is also prohibition Inspector is not a police officer and so he cannot investigate into the matter and can file the charge-sheet. Despite this

statutory provision, they have registered the offence and filed the charge-sheet. The whole investigation and action is ex-facie illegal, without authority and jurisdiction. If the prosecution evidence is scanned by this Court and is re-appreciated, then it would become crystal clear that the complainant has vexatiously and unnecessarily detained, searched and arrested the present appellant – original accused No. 3 and has fabricated a documentary evidence and he with malafide intention suppressed the material evidence in the form of photograph and video and thus actually the proceedings under Section 58 of the Act deserves to be initiated against the responsible officer and specially against Mr. J.J. Mewada – the complainant.

15.Mr. Agrawal has further submitted that if the prosecution evidence is scanned, then the

documents which are of doubtful nature should not have been produced, proved or exhibited. These documents have not been proved and exhibited in the deposition of Mr. Mewada when he was examined as P.W. No. 7 and such documents were proved in the deposition of Investigating Officer Mr. Sindhi – P.W. No. 8 despite the objection raised by the defence counsel. The documents bearing the signatures of Mr. Mewada were not got proved during his deposition and those documents were got proved only during the course of recording of evidence of Mr. Sindhi. He has, therefore, submitted that these documents have subsequently been concocted or fabricated. There was nothing against the appellant – accused No. 3 and for this reason only, the full text copy of the case diary was not produced in a sealed cover while submitting the charge-sheet or at any time during the trial.

16.Mr. Agrawal has further submitted that the muddamal samples were not kept in proper custody or proper form and all precautions were not taken so as to avoid any tampering with the contents of the sample. There was no sufficient and reliable evidence on record to show as to on which date, by whom and when the muddamal was produced before the Court and when it was so, in light of the principles laid down by the Hon'ble Supreme Court in the case of **Valsala V/s. State of Kerala, AIR 1994 S.C. 117**, the appellant – original accused No. 3 deserves to be acquitted.

17.Mr. Agrawal has further submitted that there is a flagrant violation of the provisions contained in Section 52 of the Act and there is no sufficient and reliable evidence on the record for compliance of Section 52 of the

Act. As per Section 52 of the Act, any Officers arresting a person under Sections 41, 42, 43 or Section 44 shall as soon as may be, inform him all the grounds for such arrest and moreover, as per sub-section (3) of Section 52, every person arrested and articles seized under sub-section (2) of Section 41, 42, 43 or 44 shall be forwarded without unnecessary delay to the Officer in-charge of the nearest police station or to the officer empowered under Section 53 of the Act and the concerned officer shall with all convenient dispatch take such measures as may be necessary for disposal according to law of such person or article. In the present case, from the evidence on record, it is clear that the original accused No. 3 was not informed the grounds for which he was arrested and the complete details of the arrest were not brought to his notice and moreover, all throughout, the articles seized were not remained in the custody of the officer in-

charge of the police station and when it is so, there is flagrant violation of Section 52 of the Act.

18.Mr. Agrawal has further submitted that there are all possibilities of tampering with the contents of the sample and necessary precautions were not taken and there is no evidence regarding safe and proper custody of the muddamal and samples. The Anamati register is got up and there is no evidence regarding identity of the muddamal. There is also no reliable evidence as to at which place the seal was affixed on the muddamal and samples. There is also no sufficient and reliable evidence regarding seizure and sealing of muddamal articles. There is also contradiction regarding nature of sealing and proving seals affixed on the muddamal and samples. There is difference in the phraseology of the seal affixed on the sample

and specimen impression alleged to be sent to the FSL are sufficient to show the tampering with the contents of the sample. No explanation has forthcome from the side of the prosecution for such type of material discrepancy in the phraseology of the seal alleged to be sent for FSL. To avoid possibility of tampering with the contents of the sample and the misuse of the seal used to seal the sample and other contraband, the seal used for sealing the muddamal and samples should also be affixed on the panchnama of seizure which is prepared on the spot and the same seal should also be handed over to any independent person after its use till the samples are sent for analysis to FSL so that the seal which was used for sealing the samples cannot be misused again before the samples were sent for analysis to FSL. There is importance of the possession of seal with any responsible person or officer. In this case, there is no iota of evidence

brought on record from the side of the prosecution to come to the conclusion that the seal which was used to seal the muddamal and samples was taken from particular officer and it was used and after its use to whom he has handed over and in whose custody it remained till the samples were sent for analysis to FSL and for want of this material evidence on record, possibility of misuse of the seal cannot be ruled out. He has, therefore, submitted that the prosecution was not serious about the sanctity of the seal process.

19. Mr. Agrawal has further submitted that simply because the appellant – accused No. 3 was accompanying the accused Nos. 1 & 2 and simply because his name was found in the information received by the complainant Mr. Mewada, he could not have been implicated and/or held to be guilty of the alleged

offence. In support of this submission, he relied on the decision of the Hon'ble Supreme Court in the case of **Sorabkhan Gandhkhan Pathan and another V/s. State of Gujarat, reported in (2004) 13 Supreme Court Cases 608**, wherein it is held that no material was produced to establish that the accused No.2 in that case had knowledge that accused No.1 was carrying contraband articles or was conniving with the said accused in carrying the contraband articles and hence conviction of accused No.2, in absence of any such material, only on the basis of his being in the auto rickshaw was not sustainable. He has, therefore, urged that the accused No.3 deserves to be acquitted on this ground.

20. Mr. B.M. Mangukiya, learned advocate appearing for the appellant – original appellant No. 4 in Criminal Appeal No. 284 of 2003 has adopted all the arguments of Mr.

Agrawal and further submitted that the accused No. 4 was implicated as an accused only on the basis of statement made by accused No. 1, Mr. Govindsinh Naksinh Chauhan that the said substance was brought by him from the accused No. 4. The accused No. 4 was thereafter arrested on 24.12.2001. He has further submitted that the learned trial Judge has failed to appreciate that there was no nexus between the accused No. 4 and the other three accused persons. The name of the accused No. 4 was not disclosed even at the most initial stage when information was said to have been given to the Superintendent, Prohibition and Central Excise on the strength of which the other three accused came to be arrested. The Act under which the accused No. 4 was arrested was a drastic legislation involving chances of deprivation of the liberty of the citizens with stringent provisions of bail and, therefore, extra caution is required to be exercised to see

that there is no fanciful involvement of any citizen at the hands of the Investigating Agency or co-accused. He has, therefore, submitted that the standard of proof is required to be insisted upon.

21.Mr. Mangukiya has further submitted that the complainant was serving in prohibition and excise department, Government of Gujarat and he was invested powers of an Officer in-charge of the Police Station under Section 53 (2) of the Act to investigate the case pertaining to NDPS Act vide Govt. of Gujarat Gazette dated 15.06.1987 bearing No. GHL16 NDS 1087/1087 (3)M. He has further submitted that it is settled law that the Officer who is empowered under Section 53 of the Act to investigate the case cannot file the first information report and is required to file a complaint under Section 190 of Cr.P.C. Moreover, he cannot file the charge-sheet

under Section 173 (1) of Cr.P.C. Considering this provision under law, FIR filed by Mr. J.J. Mewada and thereafter filing charge-sheet under Section 173 (1) of Cr.P.C. is without power and hence, the whole trial is required to be vitiated.

22.Mr. Mangukiya has further submitted that out of the three accused persons, only one had implicated the appellant during interrogation, and if the prosecution case that there was collusion/conspiracy between the accused No. 1 and the other three accused and were acting in furtherance of such collusion, then all the three accused who were initially arrested, would have named the accused No. 4. This shows that the other two accused were not even knowing the accused No. 4. From the evidence of P.W. 8 - R.S. Sindhi, it is apparently clear that no contraband article was found from the possession of the

accused No. 4. Simply because one of the accused has given the name of the accused No. 4 and stated that the contraband articles were brought from the accused No. 4 residing at village Dudhalia, Tal. Gandhar, Dist. Zalavad, Rajasthan and simply because accused No. 4 was arrested from the said place, it could not be said that the accused was dealing in the contraband articles. He has further submitted that P.W. 8 - R.S. Sindhi has not recorded the statement of the persons residing in the same locality nor collected any adverse evidence against the accused No. 4 which would even remotely involve the accused No. 4 for commission of such offence. He has, therefore, submitted that no case was made out by the prosecution against the accused No. 4 and he was falsely implicated in the offence in question. Mr. Mangukiya has, therefore, submitted that the accused No. 4 deserves to be acquitted.

23.Mr. K. P. Raval, learned Additional Public Prosecutor, on the other hand has supported the order and judgment of the learned Joint District Judge & Additional Sessions Judge, Ahmedabad (Rural) and submitted that there was no violation of any statutory provision and all necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the provisions contained in Section 50, 52 (3), 55 & 57 of the Act were violated. Mr. Raval has relied on the decision of the Hon'ble Supreme Court in the case of **State of Punjab V/s. Balbir Singh, (1994) 3 S.C.C. 299** wherein it is held that the provisions of Section 52 & 57 are by themselves not mandatory. These provisions contain certain procedural instructions for strict compliance by the Officers. But if there is no strict compliance of any of these

instructions that by itself cannot render the acts done by these Officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore, it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. Mr. Raval has further submitted that the prosecution has clearly established beyond reasonable doubt the charges levelled against all the four accused as the accused Nos. 1 & 2 were found in conscious possession of a huge quantity of a narcotic substance brown sugar and the accused No. 3 has aided and abetted the accused Nos. 1 & 2 in regard thereto. He was found in the company of accused No. 1 and 2 and he was aware about the fact that the accused Nos. 1 & 2 were

possessing contraband articles with them. The accused No. 1 has given the name of the accused No. 4 and he has stated in his statement that the contraband articles were brought from accused No. 4 who is residing at the given address in Rajasthan and the accused No. 4 was found from that place. He has, therefore, submitted that all the four accused were rightly implicated in the said offence. Since the prosecution has established by all possible believable, trustworthy and corroborative evidence and since the documentary evidence on the record of the proceedings clearly establish the involvement, presence and role of each of the accused in the offences charged with, even if there is any discrepancy from the testimonies of the prosecution witnesses, the same would not affect the case of the prosecution. The prosecution having clearly established beyond reasonable doubt the guilt of all the four accused, the conviction order passed by the

Learned Trial Judge is required to be upheld.

24. We have considered the submissions advanced by Mr. R. M. Agrawal and Mr. B.M. Mangukiya, learned advocates appearing for the appellants - original accused Nos. 3 & 4 in Criminal Appeal Nos. 278 & 284 of 2003 respectively and Mr. K.P. Raval, learned Additional Public Prosecutor, appearing for the State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Joint District Judge and Additional Sessions Judge, Ahmedabad (Rural) convicting the accused Nos. 1 to 4 and sentencing them for

R.I of 10 years and fine of Rs.1 lac each and in default thereof, to undergo further S.I of one year each.

25.In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the Learned Trial Judge has recorded a just and correct conclusion holding the accused Nos. 1 to 4 guilty, we may first advert to the oral testimony of the prosecution witnesses.

26.The case of the prosecution is more or less based on the evidence of police personnels. There are in all 8 prosecution witnesses. P.W. 1 – Amrishbhai Hemendrabhai Patel – Exh. 17 is the panch witness. P.W. 2 – Rajubhai Babubhai Soni – Exh. 24 is the person who has weighed the muddamal articles. The rest of the witnesses are police personnels. P.W. 3

– Jashwantsinh Mulubha Chudasama – Exh. 26 who is A.S.I. P.W. 4 - Bachubhai Bhawanbhai Vaghela – Exh. 27 is permanent P.S.O. in Prohibition department, Western station. P.W. 5 – Kalubhai Tejabhai Parmar – Exh. 30 is Crime Writer. P.W. 6 – Mohansinh Chimanlal Rao – Exh. 33 is A.S.I. and member of the raiding party as well as the carrier. P.W. 7 – Jayantibhai Jethalal Jewada – Exh. 38 is the complainant and an officer of the raiding party and P.W. 8 – R.S. Sindhi – Exh. 44 is the Investigating Officer. The main documentary evidence on which reliance is placed by the prosecution is the complaint Exh. 41, Raiding panchnama Exh. 22, F.S.L. Report Exh. 51 and other documents supporting the case of the prosecution with regard to satisfaction of all the requisite formalities laid down under the Act.

27.From the detailed examination and analysis

of the prosecution witnesses and the documentary evidence produced on record by the prosecution, it appears to us that the charge levelled against the accused Nos. 1 & 2 has been proved beyond any reasonable doubt and it has been stated at the bar by the learned advocates appearing for the appellants that these two accused have not preferred any appeal challenging their conviction. Though several contentions were raised before the Trial Court and before this Court by the learned advocates appearing for the original accused Nos. 3 & 4 challenging their conviction, we do not, however, think it just and proper to deal with all these contentions as their conviction and sentences are liable to be vitiated only on the ground that no evidence has come on record which would establish beyond reasonable doubt that the accused No. 3 was aware about the fact that the accused Nos. 1 & 2 are having the contraband articles and if we ignore the

statement made by the accused No. 1 stating that the contraband articles were brought from accused No. 4, there is no independent evidence establishing the fact that the accused No. 4 was also involved in commission of this offence.

28. In the case of **State of Punjab V/s. Balkar Singh and another, (2004) 3 S.C.C. 582,** the accused were alleged to have been found present at the place where about 100 bags of poppy were recovered. They were sitting on such bags and they have failed to give any satisfactory explanation for being present at that place. The Hon'ble Supreme Court in that case has considered the question as to whether mere presence of the accused is enough to take the view that the accused was in conscious possession of prohibited substance. The Hon'ble Supreme Court held that mere being found to be present at the

place where the poppy husk bags were found and the failure to give any satisfactory explanation for being so present did not prove that the accused persons were in possession of the said poppy husk bags. Similarly, in the present case, simply because the accused No. 3 was accompanying the accused Nos. 1 & 2 and simply because his name was found in the information so received by Mr. Mewada, it cannot be proved beyond reasonable doubt that the accused No. 3 was aware about the fact that the accused Nos. 1 & 2 were carrying Muddamal contraband articles with them and that he has abetted the accused Nos. 1 & 2 in commission of the alleged offence.

29. In the case of **Sorabkhan Gandhkhan Pathan and another vs. State of Gujarat, reported in (2004) 13 Supreme Court Cases 608**, the Hon'ble Supreme Court has acquitted the

accused No. 2 who was travelling in an auto-rickshaw by holding that no material was produced to establish that the accused No.2 in that case had knowledge that accused No.1 was carrying contraband articles or was conniving with the said accused in carrying the contraband articles and hence conviction of accused No.2, in absence of any such material, only on the basis of his being in the auto-rickshaw was not sustainable. On the same parity of reasoning, the conviction of the accused No. 3 in the present case cannot be sustained simply because he was in the company of the accused Nos. 1 & 2 without there being any material on record to show that he was aware about the fact that the accused Nos. 1 & 2 were carrying the contraband articles with them or that he was conniving with the accused Nos. 1 & 2 in carrying the contraband articles.

30.Similarly, the conviction of accused No. 4 is also unsustainable in view of the fact that nothing objectionable was found from him. As stated earlier, he was implicated only on the basis of the confessional statement made by the accused No. 1. Even after the visit of the Investigating Officer to the place from where the accused No. 4 was found and arrested, nothing was found from his possession. There is no independent evidence showing guilt of the accused No. 4. As per the decision of the Hon'ble Supreme Court in the case of **Abdul Rashid V/s. State of Bihar, AIR 2001 S.C. 2422** if the statement of the appellant made to the Superintendent of Excise which is not admissible in evidence is taken out from the purview of consideration then on the residue of material, namely, that the appellant was found coming together with the co-accused and on the statement of the co-accused that contraband brown sugar was brought from

accused No. 4, a conviction under the provisions of Narcotics Drugs and Psychotropic Substances Act, 1985 cannot be sustained. This decision alone is sufficient for acquittal of the accused Nos. 3 & 4 both.

31. In the case of **Narcotics Control Bureau, Jodhpur V/s. Murlidhar Soni and others, (2004) 5 S.C.C. 151**, the Hon'ble Supreme Court was concerned with a case where accused's father (since died) was carrying a cloth bundle containing contraband, and the role of the accused was only to take his father on his scooter to the place where they were allegedly arrested. There was no evidence showing that accused had knowledge that the bundle contained any contraband articles. In absence of any material showing conscious possession of the contraband by the accused and the accused's father being dead, it was held that accused cannot be said to be

in possession of any contraband articles and hence, his conviction under Section 21 was rightly set aside by the High Court. The Court was also in agreement with the finding of the High Court that the statements of the accused persons have been obtained by the Prosecuting Agency under duress. In the present case also, such statement of accused No. 1 has no evidentiary value in the eye of law. Except this statement, there is no other evidence which would justify the conviction of the accused No. 4.

32. In the above view of the matter and looking to the peculiar facts of the present case and in light of the decisions referred to herein above and the principles laid down therein, we are of the opinion that the conviction order passed against the accused Nos. 3 & 4 cannot be sustained. The Appeal, therefore, succeeds. The order of the learned Joint

District Judge & Additional Sessions Judge, Ahmedabad (Rural) dated 20.01.2003 passed in NDPS Case No. 3 of 2002 convicting the accused Nos. 3 & 4 for offences punishable under Section 8 (c) read with Section 22 (c) and 29 of the Act and sentencing them to rigorous imprisonment of 10 years and fine of Rs. 1 Lacs each and in default thereof, simple imprisonment for one year each for commission of such offence is hereby quashed and set aside. The appellant – original accused Nos. 3 – Rohitbhai Keshubhai Solanki in Criminal Appeal No. 278 of 2003 and the appellant – original accused No. 4 - Babankhan @ Lala Gufrankhan Pathan in Criminal Appeal No. 284 of 2003 are hereby acquitted from the charges levelled against them. The respondent – State of Gujarat and the jail authority is hereby directed to release both the appellants – original accused Nos. 3 & 4 from jail forthwith unless their presence is required in connection with

any other case. Amount of fine, if paid shall be refunded to them.

[A. M. KAPADIA, J.]

[K.A. PUJ, J.]

Savariya